(16)

No. 96-1037

In The

Supreme Court of the United States

October Term, 1996

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

vs.

MANUFACTURING TECHNOLOGIES, INC., an Oklahoma corporation,

Respondent.

On Writ of Certiorari to the Court of Appeals, Division I, for the State of Oklahoma

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether an Indian Tribe is immune from suit in a state court arising out of default on a promissory note given to secure economic development outside of Tribal Lands?

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STATEMENT OF THE CASE

Respondent, Manufacturing Technologies, Inc., ("Manufacturing Technologies") generally accepts the completeness and accuracy of the Statement of the Case contained at pages 3 through 10 of Petitioner's Brief. The Statement is burdened by extraneous material relating to collection efforts made by other parties to other litigation against Petitioner, The Kiowa Tribe of Oklahoma, (the "Tribe"). The Tribe acknowledges there has been no collection effort taken against it by Manufacturing Technologies. Any reference to the effect of collection of a judgment against the Tribe is premature, is intended to be prejudicial, and should be disregarded.

Manufacturing Technologies sold stock of Clinton-Sherman Aviation, Inc., an Oklahoma corporation, to the Tribe, taking the Note of the Tribe in exchange for the stock. The Tribe does not dispute that the Note was delivered to Manufacturing Technologies in exchange for the stock outside of Tribal Lands, that the Tribe received the stock outside of Tribal Lands, and that the Note was to be paid by the Tribe outside of Tribal Lands. It is undisputed that the acquired corporation was a commercial enterprise doing business outside of Tribal Lands. It is also uncontroverted that the Tribe made no payments on the Note. (Petitioner's Brief at 6, 7.)

SUMMARY OF ARGUMENT

The District Court of Oklahoma County had jurisdiction to hear the suit on breach of a Promissory Note brought by Manufacturing Technologies, an Oklahoma corporation, against the Tribe. The existence of a possible defense of sovereign immunity did not divest the District Court of its jurisdiction to hear the case. *Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838 (1989).

The Oklahoma Court of Appeals properly affirmed the District Court's judgment in favor of Manufacturing Technologies against the Tribe for the Tribe's default in its obligations under the Promissory Note, relying on the Oklahoma Supreme Court decision in *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S. Ct. 1675 (1996).

Manufacturing Technologies agrees that the federal government has the power to regulate Indian commerce and Indian tribes. It is clear that Congress has such authority under the treaty[1], commerce[2], and supremacy[3] provisions of the United States Constitution and the Laws of Congress adopted thereunder. It is also clear that this authority is not exclusive. *See Organized Village of Kake v. Egan*, 369 U.S. 60 (1962); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

The Tribe is not entitled to the protection of immunity from suit when it goes off Tribal Lands in a commercial venture. It is subject to non-discriminatory state law otherwise applicable to all citizens of the State. *Mescalero Apache Tribe*, *supra* at 147.

Manufacturing Technologies takes issue with the unfounded generalization of the Tribe that regulation of the Tribe is the sole purview of the federal government and that the State therefore must dismiss this action. It claims an immunity not afforded to a sister state (*Nevada v. Hall*, 440 U.S. 410 (1979)), a foreign state (28 U.S.C. § 1602, *et seq.*) or the federal government, *United States v. Winstar Corp.*, __ U.S. __, 116 S. Ct. 2432 (1996). The Tribe is not protected by sovereign immunity from suit when it goes off Tribal Lands in a commercial transaction. *Organized Village of Kake*, *supra* at 571; *Mescalero Apache Tribe*, *supra* at 163.

1. U.S. Const. art. II, § 2, cl. 2.

2. U.S. Const., art I, § 8, cl. 3.

3. U.S. Const. art IV, § 3, cl. 2.

PROPOSITION I.

THE DISTRICT COURT OF OKLAHOMA COUNTY HAS JURISDICTION TO HEAR THIS CASE.

The District Court of Oklahoma County has jurisdiction to hear and decide the question of sovereign immunity raised by the Tribe despite the Tribe's protestations to the contrary. *Graham*, *supra*.

In *Graham*, the State brought action against the Cherokee Tribe to recover Oklahoma excise taxes for cigarette sales on Tribal Lands to non-tribal members, and levied on the conduct of bingo games. The case was removed to the United States District Court by the Cherokee Tribe, and the District Court dismissed the action on the basis that the Tribe was immune from suit because of sovereign immunity. The Court of Appeals for the Tenth Circuit affirmed the District Court at 852 F.2d 951. This Court vacated the Court of Appeals affirmance at 108 S. Ct. 481. The Court of Appeals then adhered to its original decision that removal was proper.

The Supreme Court again granted certiorari and held that the possible existence of tribal sovereign immunity did not convert the state tax question into a federal question cognizable only in federal courts citing the "Well-Pleaded Complaint Rule" as discussed in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987).[4]

The Court in *Graham* states that "it has long been settled that the existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into

4. The Well-Pleaded Complaint Rule provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff master of the claim; "he or she may avoid federal jurisdiction by exclusive reliance on state law."

one which, in the statutory sense arises under federal law," citing *Gully v. First Nat'l. Bank*, 299 U.S. 109 (1936).

In *Graham*, the Court held that "the possible existence of a tribal immunity defense, then, did not convert Oklahoma tax claims into federal questions, and there was no independent basis for original federal jurisdiction to support removal." *Graham*, *supra* at 842.

The cause of action sued upon in the District Court of Oklahoma County was for default on a promissory note, an action cognizable in the state court. That court had jurisdiction to hear the case and to adjudicate the merits of the defense of sovereign immunity raised by the Tribe.

PROPOSITION II.

THE TRIBE IS NOT EXEMPT FROM SUIT FOR ITS ACTS WHEN IT GOES OFF TRIBAL LANDS IN A COMMERCIAL VENTURE.

The Tribe is a federally recognized Indian Tribe. (Petitioner's Brief at 3.) As such it is subject to the provisions of the U.S. Const., art. I, § 8, cl. 3 which provides in part that "the Congress shall have power . . . to regulate Commerce . . . with the Indian Tribes."

Tribal sovereign immunity from suit is a creation of the Supreme Court. *Oklahoma Tax Comm'n v. Citizen Band Potawatomie Indian Tribe of Oklahoma*, 498 U.S. 505 (1991). The Court says at 510, that "a doctrine of tribal sovereign immunity was originally enunciated by this Court, and has been re-affirmed in a number of cases," citing *Turner v. United States*, 248 U.S. 354, 358 (1919), and *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

This Court may determine that the Tribe is not entitled to sovereign immunity when it goes off tribal lands in a commercial venture.

The *Kake* Court examined the division of jurisdiction and control between the federal government and the states both on and off Tribal Lands, in the context of the enforcement of state criminal laws on reservations and in the regulation of fishing rights. *Organized Village of Kake*, *supra* at 64. Even though the Alaska Statehood Act retained in the United States absolute jurisdiction and control over Indian property, (including the fishing rights subject to the litigation), the Court held that the Tribe's fish-traps were not excluded from application of the state conservation laws. The Court in *Kake* states that the test of whether a state law could be applied on an Indian reservation was whether the application of that law would interfere with reservation self-government, citing *Williams v. Lee*, 358 U.S. 217 (1959).

The Court also states that "*Draper*[5] and *Williams* indicate that 'absolute' federal jurisdiction is not invariably exclusive jurisdiction." *Organized Village of Kake*, *supra* at 68.

The fish-traps were located off of the Tribe's reservation. The Court says, "State authority over Indians is yet more extensive over activities, such as in this case, not on any reservation." *Organized Village of Kake*, *Id.* at 75.

In *Mescalero Apache Tribe*, *supra*, this Court considered the rights of the State of New Mexico to tax a commercial enterprise operated by the Mescalero Apache Tribe off of its reservation. The State of New Mexico levied a use tax assessment and sales tax on The Sierra Blanca Ski Enterprise, a ski resort

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5. *Draper v. United States*, 164 U.S. 240 (1896).

owned and operated by the Tribe on lands leased from the United States Forest Service. The Tribe protested, claiming immunity from taxation by the State on tribal activities conducted outside the boundary of the tribal reservation. The Court says at 147, 148:

> At the outset, we reject — as did the state court — the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise "whether the enterprise is located on or off tribal land." Generalizations on this subject have become particularly treacherous.

The Court further says, at 148, 149:

> But tribal activities conducted outside the reservation present different consideration. "State authority over Indians is yet more extensive over activities . . . not on any reservation." *Organized Village of Kake, supra*, 369 U.S., at 75, 82 S.Ct., at 571. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State. See, e.g., *Puyallup Tribe v. Department of Game*, 391 U.S. 392, 298, 88 S.Ct. 1725, 1728, 20 L.Ed.2d 689 (1968); *Organized Village of Kake, supra*, 369 U.S., at 75-76, 82 S.Ct., at 570-571; *Tulee v. Washington*, 315 U.S. 681, 683, 62 S.Ct. 862, 863, 86 L.Ed. 1115 (1942); *Shaw*

> *v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575, 48 S.Ct. 333, 72 L.Ed. 709 (1928); *Ward v. Race Horse*, 163 U.S. 504, 16 S.Ct. 1076, 41 L.Ed. 244 (1896). That principle is as relevant to a State's tax laws as it is to state criminal laws, see *Ward v. Race Horse, supra*, at 516, 16 S.Ct., at 1080, and applies as much to tribal ski resorts as it does to fishing enterprises. See *Organized Village of Kake, supra*.

Hoover, supra arose out of a transaction contemporaneous to that of Manufacturing Technologies' transaction with the Tribe. Manufacturing Technologies and Hoover each sold stock in a business enterprise to the Kiowa Tribe taking Promissory Notes from the Tribe in consideration for the stock transfer. In *Hoover*, the Oklahoma Supreme Court first found that the state court had jurisdiction over the merits of a tribal immunity defense to claims arising under state laws, citing *Graham, supra*. "State laws may be applied to Indians, even on reservations, 'unless such application would interfere with reservation self-government or impair a right granted or reserved by federal laws . . . *Organized Village of Kake, supra*.' "

The Oklahoma Supreme Court cited with approval the authority of *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989). This case also involves state court jurisdiction over a tribe, the Pueblo of Acoma, which entered into a contract with a roofing consultant to supervise roof installation on two projects owned by the pueblo off of its reservation. The New Mexico District Court granted the Pueblo's Motion to Dismiss based on the sovereign immunity of the Pueblo.

The New Mexico court reversed the District Court on the

basis of comity, *Padilla*, *supra* at 850, relying on *Hall*, *supra*. *Hall* examined the jurisdiction of California over the tortious act of an agent of the State of Nevada while in California. *Hall* holds that there is no constitutional provision that prohibits a state's exercise of jurisdiction over a sovereign sister state. *Hall*, 440 U.S. at 426.

The Oklahoma Supreme Court held that since the State of Oklahoma allowed suit against itself, the Tribe was subject to suit and liable for breach of its contract when the contract is entered into outside tribal lands. *Hoover*, *supra* at 62.

The position of the Tribe regarding state jurisdiction is analogous to that of a foreign state doing business within the boundaries of a state. Congress has legislated limitations on sovereign immunity of foreign states engaged in commercial actions within the United States at 28 U.S.C. § 1602, *et seq*. Section 1602 provides, in part that, ". . . Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgment rendered against them in connection with their commercial activities . . ."

Justice Stevens, in his dissent in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 515 (1991) says:

> . . . Nevertheless, I am not sure that the rule of tribal sovereign immunity extends to cases arising from a tribe's conduct of commercial activity outside its own territory, cf. 28 U.S.C. § 1605(a) ('A foreign state shall not be immune from the jurisdiction for courts of the United States or of the States in any

> case . . . (2) in which the action is based upon a commercial activity carried on in the United States by a foreign state . . . .')
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> And further, at page 515, . . . My purpose in writing separately is to emphasize that the Court's holding in effect rejects the argument that this governmental entity — the Tribe — is completely immune from legal process.

These statutes recognize the territorial limit of sovereignty and unequivocally provide that a foreign state which conducts commercial activities within the United States subjects itself to the jurisdiction of courts of the United States or the States.

The Court in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. __, 117 S. Ct. 2028 (1997) says that "Indian Tribes should be accorded the same status as foreign sovereigns, against whom States enjoy Eleventh Amendment immunity," citing *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779-82 (1991).

The federal government is also bound by its contractual obligation. Claimants sought to recover amounts due them as beneficiaries of federally issued war risk term insurance policies. *Lynch v. United States*, 292 U.S. 571 (1934). The Court held that the federal government may not simply repudiate its contractual obligations. *Id.* at 580.

The defense of sovereign immunity for acts occurring within the jurisdiction of the State is not allowed to a sister state (comity), to a foreign state (28 U.S.C. §1602, *et seq*.), and is limited in application the United States. The Tribe cannot claim a greater immunity than these instrumentalities.

PROPOSITION III.

THE TRIBE WAIVES ITS SOVEREIGN IMMUNITY WHEN IT ENGAGES IN COMMERCIAL ACTIVITIES OFF TRIBAL LANDS.

The Tribe promised to pay Manufacturing Technologies the sum of $285,000 according to the terms of the Promissory Note. It voluntarily engaged in a commercial venture off Tribal Lands. It failed to pay and now asserts the defense of sovereign immunity from suit. The Tribe has waived its immunity by its actions.

The Court in *Lynch* states that "When the United States enters contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." The *Lynch* Court further says at 580, that, "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Sinking-Fund Cases*, 99 U.S. 700, 719 (1878).

Winstar Corp, *supra* considered the right of the federal government to effectively breach a contract it had entered into by subsequently enacting legislation which made the government's performance of the of the contract impossible. This Court held, by plurality opinion, that the government was liable for damages for the breach. The Court by way of analogy states at 2457, "At the other end are contracts, say, to buy food for the army; no sovereign power is limited by the government's promise to purchase and a claim for damages implies no such limitation. . . So long as such a contract is reasonably construed to include a risk-shifting component that may be enforced without effectively barring the exercise of that power, the

enforcement of the risk allocation raises nothing for the unmistakability doctrine[6] to guard against, and there is no reason to apply it."

The Note given by the Tribe to Manufacturing Technologies contains the language "Nothing in the Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." JA-14. The Tribe thus gives its solemn promise to pay according to the terms of the Note and then suggests that it will not be liable for breach of the terms of the Note.

The Court, in *Winstar Corp*, *supra* at 2473, cites *Murray v. Charleston*, 96 U.S. 432, 445 (1878) and *New Jersey v. Yard*, 95 U.S. 104, 116, 117 (1877) for the proposition that a government contract "should be regarded as an assurance that (a sovereign right to withhold payment) will not be exercised. A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity."

"Can it be believed that it was intended by either party to this contract that, after it was signed by both parties, one was bound for ever, and the other only for a day? That it was intended to be a part of the contract that the State of New Jersey was, at her option, to be bound or not?" *Yard*, *supra* at 116.

The Tribe must be bound by its promise to pay, freely given in exchange for valuable consideration, and relied on by Manufacturing Technologies.

Had the Tribe required that its promise be made and performed within Tribal Lands perhaps the matter would be different. In this case, when it goes off Tribal Lands, in a purely

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6. The canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms. *Id.* at 2457.

commercial venture, it is subject to non-discriminatory state law applied equally to all citizens of the state. *Organized Village of Kake*, *supra* at 75.

The Tribe asserts that immunity from suit is required to protect tribal self government. "A tribe's power to prescribe the conduct of tribal members has never been doubted, and our cases establish that 'absent governing Acts of Congress,' a State may not act in a manner that 'infringe[s] on the right of reservation Indians to make their own laws and be ruled by them.' " *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171, 172 (1973). The limitation on this policy however is evident. This language does not give a right to a Tribe to go off reservation and enforce its laws and protection on the citizens of the state it contracts with.

The Tribe also asserts that Manufacturing Technology could have secured a waiver of the Tribe's supposed immunity from suit by following the requirements of 25 U.S.C. § 81. Manufacturing Technologies is not required to secure a waiver of rights which do not exist off Tribal Lands. If the Tribe wished to be protected by its sovereign immunity, it could have required that execution and performance of the Promissory Note take place on Tribal Lands.

The Tribe asserts that it will be subjected to collection efforts if it is held accountable on its promise to pay. It equates this result to a "complete infringement upon tribal self-government" (Petitioner's Brief at 29). Justice Breyer, in his concurring opinion in *Winstar Corp*, *supra* at 2475, citing *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 24 (1977), "Any financial obligation could be regarded in theory as a relinquishment of the State's spending power, since money spent to repay debts is not available for other purposes .... Notwithstanding these effects, the Court has regularly held that

the States are bound by their debt contracts". It is difficult to see how the Court could, in a principled fashion, apply the government's rule in this case without also making it applicable to the ordinary contract case (like the hypothetical sale of oil) which, for the reasons explained above, are properly governed by ordinary principles of contract law. To draw the line — *i.e.*, to apply a more stringent rule of contract interpretation .... this Court has previously rejected the argument that Congress has "the power to repudiate its own debts which constitute 'property' to the lender, simply in order to save money."

The plurality in *Winstar Corp.*, *supra* at 2459, says "Once general jurisdiction to make an award against the Government is conceded, a requirement to pay money supposes no surrender of sovereign power by a sovereign with the power to contract."

CONCLUSION

The Tribe attempts to arrogate to itself a right of immunity from suit which is not accorded to a foreign government, a State, or indeed, to the United States. It gives its solemn promise to pay, to a citizen of the State of Oklahoma, within the jurisdiction of the State of Oklahoma, and receives the consideration for the Note, and then attempts to avoid its promise based upon its supposed sovereign immunity.

The Tribe would have us believe that its promise to pay is meaningful only if it later decides to honor it. This position is not supported by the Constitution of the United States, congressional enactments, or the decision of this Court.

The judgment of the Court of Appeals, Division 1, for the State of Oklahoma should be affirmed.

Respectfully submitted,

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